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January 3, 1998

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The Office of the Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, NW  
Washington, DC 20554

Dear Secretary:

Enclosed please find comments regarding the proposed rulemaking, MM  
Docket No. 97-234 adopted November 25, 1997 regarding Competitive  
Bidding for Commercial Broadcast and Instructional Television Fixed  
Services Licenses.

Sincerely,

  
Terry A. Cowan

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JAN 13 1998

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In the Matter of )

Implementation of Section 309(j) )

of the Communications Act )

Competitive Bidding for Commercial )

Broadcast and Instructional Television )

Fixed Service Licenses )

MM Docket No. 97-234

COMMENTS ON NOTICE OF PROPOSED RULEMAKING ADOPTED NOVEMBER 25, 1997

Terry A. Cowan, the licensee of FM Broadcast Station KNLR, Bend, Oregon; licensee of FM Translator Station K240CG, Prineville, Oregon, and applicant for a new FM Broadcast Station, Klamath Falls, Oregon, filed prior to July 1, 1997; and applicant for a new FM Broadcast Station, Bend, Oregon, filed after June 30, 1997 hereby comments on the proposed rulemaking regarding the Competitive Bidding for Commercial Broadcast Licenses.

While it may be true that auctions will more quickly resolve instances of mutually exclusive applications for new broadcast stations, I do not believe that is the best way to provide a new broadcast service to a community. I particularly wish to scrutinize the arguments set forth in paragraph 18 of the NPRM which states in part; "We have, in these other contexts, cited the advantages of auctions in terms of avoiding the considerable delay and substantial expenditures associated with comparative hearings; allocating spectrum to those valuing it the most and best able to serve the public; and recovering for the public a portion of the value of the spectrum that is made available for commercial use."

First, there would be no delay if the Commission were to adopt a policy of issuing construction permits to new stations on the basis of

demand. That is, if an applicant wishes to serve a particular community; determines that a new facility will in fact meet the Commission's engineering rules; and the applicant is found to meet all other Commission criteria; the Commission should without entertaining proposals from other applicants grant the applicant a permit to construct the station.

In essence, the Commission predicts that "he who pays the most will serve the best" ("Allocating spectrum to those valuing it the most and best able to serve the public"). That is as much a non sequitur as the predictions at the root of the integration policy which the court has struck down. It is far more likely that an applicant who invests time and energy in developing a grantable application will be the applicant who will best serve the community. Furthermore, any applicant who is granted a permit via auction, has used valuable resources which could have been used to serve the community either through a better facility, better programming or larger staff. The argument that "he who pays the most will serve the best" is without merit. The granting of applications based upon need rather than opportunity is a better policy of distributing broadcast resources.

In paragraph 18 the Commission also cites another advantage of auctions as "Recovering for the public a portion of the value of the spectrum made available for commercial use." Although the Congress has authorized and the President has signed a bill providing authority to auction and collect money in exchange for a grant, that concept is foreign to the original Communications Act of 1934. Senator Clarence Dill, chief sponsor of the Communications Act of 1934 said, "The government does not own the frequencies as we call them. or

the use of the frequencies. It only possess the right to regulate the apparatus, and that right is obtained from the provision of the constitution which gives Congress the power to regulate interstate commerce."

Auctions generally will be of greater benefit to existing stations that are bidding on an additional station in the same community. Many of the resources will already be in place such as towers, studios, staff, established business relationships and cashflow. They may also be willing to invest more in a new facility to limit competition. In short, auctions will make it more difficult for newcomers to enter the marketplace and limit diversity in the marketplace.

The preceeding comments were directed primarily to Broadcast Stations. As for FM Translator Stations, the Commission should not even consider auctions. In paragraph 39 the Commission acknowledges that there are a "small" number of mutually exclusive applications for commercial FM translators and that they already have in place a procedure for resolving those applications. FM translators are widely used in the western part of the United States to reach communities which have no local service either AM or FM. Some may have only partial daytime service and night-time sky-wave AM service. Often small community groups or individuals, both without extensive resources are licensees of these translators. Several years ago the Commission changed a number of the rules regulating translators which placed an increased burden upon these small entities. If the purpose of the Commission is to promote service to as much of the population as possible, unnecessary regulations must be avoided.

While the Commission does not specifically address other stations in the Auxillary Service, it would place an extreme burden upon

licensees of Broadcast Stations to obtain by auction authorizations for studio-transmitter links, inter-city relay and remote pickup stations.

I am also opposed to the use of auctions to oppose mutually exclusive applications for upgrades and modifications of broadcast facilities. The Commission may simply avoid such an issue by granting upgrades and modifications based upon a "first come-first served" basis that meets its engineering requirements.

In paragraph 56 the NPRM invites comments on "Upfront Payments, Reserve Prices, Minimum Opening Bids, and "Daisy Chains." To suggest that there be reserve prices or minimum opening bids suggests a motivation other than simply resolving mutually exclusive applications. While I am already on record as opposing auctions as a means for solving a problem which need not exist; I am doubly opposed to the Commission attempting to assess a value for the grant of an application. If the sole purpose of the auction is to resolve mutually exclusive applications, the Commission need only give a specific time period in which the successful bidder is required to pay; afterwhich he becomes disqualified and the next higher bidder is selected. On the other hand, to predetermine a minimum bid or reserve price would suggest that the purpose is not to resolve mutually exclusive applications but to generate funds for the Federal Treasury.

Paragraphs 59 through 67 discuss filing procedures with regard to windows for filing and pre-auction forms. Again, I encourage the Commission to adopt an "on demand" approach to accepting applications and thus avoid windows and multiple applications for the same facilities.

The NPRM also questions whether under certain situations, if the

application of a successful bidder is ungrantable due to technical or legal reasons, the bidder may still be required to make default payments. In most other business transactions, sellers of merchandise or services provide refunds or comparable products or services should the product or service being sold be defective. I see no reason why the Commission should not do the same.

Summary. The Commission has upon the authority of the Congress and President asked for comments on the implementation of a major policy change without proposing the change and inviting comments on the merits of such a change. In short, the Commission is guilty of committing the Fallacy of the Complex Question in its reasoning. It assumes that competitive bidding should be used to resolve mutually exclusive applications; even though during the more than 60 years of the Communications Act of 1934; this method has not been used.

There are in fact two questions. Should the Commission determine grants for permits by competitive bidding, and if so, how should it be implemented? To say that Congress has mandated competitive bidding for broadcast applications is only begging the question.

I therefore urge the Commission to abandon its auction fever and consider alternative methods for resolving mutually exclusive applications and develop a method of accepting applications which can not become mutually exclusive in order to provide service to the public in a timely manner by those who desire to serve the public.